THE PACIFIC

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Brigham Young Must Pay Alimony to Ann Eliza.

OPINION OF CHIEF JUSTICE McKEAN.

This is an action for divorce, and the plaintiff moves for alimony and sustenance *pendente lite*.

McKEAN CH. J.—In her complaint the plaintiff alleges, among other things, that she was born at Nauvoo, in the State of Illinois; that she is now, and has been continuously since the year 1848, a resident of Salt Lake County, in this Territory; that on the 6th day of April, 1868, she and the defendant, Brigham Young, intermarried at that county; that ever since then she has been, and is now, the wife of the defendant; that at the time of said marriage she was in the twenty-fifth year of her age, and the mother of two children, the issue of a former marriage; that those children were aged, one four years and the o her two years; that neither she nor her children had any estate or patrimony whatever, and that they were entirely dependent upon her for their nurture and education; with all of which facts the defendant was well acquainted, and of which he had been informed prior to the said marriage; that said children, both of whom are boys, are still living, and, from the time of her marriage to the defendant, have been continuously, and are now, under her custody, and with no means of support except such as she can provide; that for a period of about one year after his marriage, the defendant lived, and cohabited with, and acted toward the plaintiff with some degree of kindness and attention, and during that time contributed to her maintenance and the support of her two little children, not, however, in a manner proportionate to his means or to her station in life; that during all the period mentioned, and ever since then she has discharged with fidelity all the duties and obligations incumbent on her as a married woman, and uniformly treated the defendant with the utmost tenderness, ever mindful of her responsibilities as a wife; that about a year after his said marriage, for some cause or motive unknown to the plaintiff, the defendant, regardless of all his marital obligations, commenced towards her a systematic course of neglect, unkindness, cruel and inhuman treatment, ending in an absolute desertion of her, and forcing upon her the conviction that the defendant no longer entertained for her the slightest feeling of affection or respect, and had altogether withdrawn from her his support and protection.

To sustain these allegations, the plaintiff states, in detail, many facts and circumstances, among others, that the defendant has failed and refused to furnish her with necessary food and medical attendance, or the means to obtain them, and prays that by the final decree of this Court the defendant be ordered and decreed to support the plaintiff and her children, and that the bonds of matrimony between the plaintiff and the defendant be forever dissolved; and that during the pendency of this action the defendant be ordered and required to pay alimony to the plaintiff, for the maintenance and support of herself and children, and sustenance to her solicitors and counsel, &c.

This complaint, which is verified, contains all necessary averments, and sets forth a complete cause of action under the statute of Utah. Were its allegations all admitted, the plaintiff would be entitled to the relief prayed for as a matter of course. But the defendant has interposed an answer, under oath, admitting some and denying some of those allegations.

The defendant first qualifiedly denies, and then qualifiedly admits, the marriage of April 6th, 1868. His denial is as follows:

"Now comes the said defendant, Brigham Young, and for answer to the bill of complaint of the said Ann Eliza Young, plaintiff, denies that on the sixth day of April, 1868, at the County of Salt Lake, Utah Territory, or at any other time or place, this defendant and the said plaintiff intermarried, or that since that time, or at any time, the said plaintiff has been, or that she now is, the wife of this defendant, on information and belief, alleges that before that time to-wit; on the tenth day of April, 1863, at Salt Lake City, Utah Territory, the said plaintiff was married to one James L. Dee, who is still living, and that ever since the said tenth day of April, 1863, the said plaintiff has been, and, on the said sixth day of April 1868, was, and still is, the lawful wife of the said James L. Dee, never, as this defendant is now advised and believes, having been divorced from the said James L. Dee. But this defendant further says, that on the sixth day of April, 1868, and at the time of the ceremony hereinafter referred to, he was informed, and then verily believed that the plaintiff had, prior to that time, been legally divorced from the said James L. Dee."

The defendant's admission of the marriage is as follows:

"But the defendant says that he and the said complainant were, on the said sixth day of April, 1868, members of the Church of Jesus Christ of Latter-day Saints, and that it was a doctrine and belief of said Church, that members thereof might rightfully enter into plural or celestial marriage. And the defendant admits that on the sixth day of April, 1868, at Salt Lake City, Utah Territory, in accordance with and pursuant to the said doctrines, customs, and belief of the said Church, a ceremony was performed to unite the plaintiff and defendant in what is known as such plural or celestial marriage." * * *. "But the defendant denies that on the said sixth day of April, or at any other time, he and the said plaintiff intermarried in any other or different sense or manner than that above admitted and set forth."

It is an anomaly in pleading to deny that a certain marriage took place in 1868, "*for*," or because, a certain other marriage took place in 1863. An argumentative denial, like this, is not good in law. The plaintiff's allegation, not being specifically denied, is admitted. (*Utah Practice Act, sec.* 65.) What does the subsequent express admission amount to?

"Where the admissions in an answer negative its general denials, the latter may be disregarded and judgment asked upon the former, when the complaint is verified, and the answer consists of such admissions and denials." (*Fremont et al. v. Seals et al*, 18 *Cal.* 433; *Blood v. Light*, 31 *Cal.* 114; *Fish v. Redington, Id.* 185.) "A sworn answer must be consistent in itself, and must not deny in one sentence what it admits to be true in the next." "The object of sworn pleadings is to elicit the truth and this object must be entirely defeated if the same fact may be denied and admitted in the same pleading." (*Hensley v. Tartar*, 14 *Cal.* 508.) The defendant's qualified and defective denial of the marriage of April 6th, 1868, is consistent with his subsequent admission that the parties were intermarried on that day. Did the defendant mean to hint what he did not like openly to say to the Court, that a marriage celebrated by authority of the "Church" of which he is the acknowledged head, is illegal, null, and void? Let us inquire whether a marriage solemnized by such authority is necessarily void.

An ordinance first enacted by the so-called State of Deseret, and afterwards reenacted by the Territorial Legislative Assembly, entitled, "An Ordinance Incorporating the Church of Jesus Christ of Latter-Day Saints," provides: "Sec. 3.—And be it further ordained that as said Church holds the constitutional and original right, in common with all civil and religious communities, to worship God according to the dictates of conscience; to reverence communion agreeably to the principles of truth, *and to solemnize marriage*, compatible with the revelations of Jesus Christ, for the security and full enjoyment of all blessings and privileges embodied in the religion of Jesus Christ free to all, it is also declared that said Church does and shall possess and enjoy continually the power and authority, in and of itself, to originate, make, pass and establish rules, regulations, ordinances, laws, customs and criterions for the good order, safety, government, convenience, comfort and control of said Church," &c.

It may be laid down as a sound legal proposition, that a marriage solemnized in Utah, either according to the forms of the "Church" of which Brigham Young is the head, or according to the forms of the common law, is a lawful and valid marriage, provided the parties to the contract are, at the time of entering into it, legally competent to intermarry.

But the defendant seeks to avoid the binding force of his admitted marriage to the plaintiff on the 6th day of April, 1868, by alleging, in effect, that neither of them was at that time competent to intermarry with any person. Not only does he allege that the plaintiff was then the wife of James L. Dee, but he further answers as follows:

"And the defendant further answering alleges, that at the town of Kirtland in the State of Ohio, on the tenth day of January, 1834, this defendant, being then an unmarried man, was duly and lawfully married to Mary Ann Angell by a minister of the gospel, who was then and there, by the laws of said State, authorized to solemnize marriages; and that the said marriage was then and there fully consummated; and that the said Mary Ann Angell, who is still living, then and there became, and ever since has been, and still is, the lawful wife of this defendant."

Thus does the defendant not only charge the plaintiff with, but confesses himself guilty of a felony. His admissions, so far as they prejudice himself only, will be taken as true; but his charges, so far as they tend to injure the plaintiff, must be proved or they will go for naught. The defendant must prove that the plaintiff was the wife of another man, and that he was himself the husband of another woman on the 6th day of April, 1868, or his allegations to that effect can have no weight as against the plaintiff. There is no replication to an answer under the Practice Act of Utah, and these allegations of the defendant are denied for the plaintiff by operation of law. "Every material allegation of the complaint, when it is verified, not specifically controverted by the answer, shall for the purpose of the action be taken as true. The allegation of new matter in the answer, shall, on the trial, be deemed controverted by the adverse party." (*Utah Practice Act, sec.* 65.) "The intention of the Code is to adopt the true and just rule that the defendant must either deny the facts as alleged, or confess and avoid them. When new matter exists it must be stated in the answer. New matter is that which, under the rules of evidence, the defendant must affirmatively establish. If the *onus* of proof is thrown upon the defendant, the matter to be proved by him is new matter." (*Piercy v. Sabin*, 10 *Cal.* 22.) The allegations that the plaintiff had another husband, and the defendant had another wife at the time of the marriage on the 6th day of April, 1868, are allegations of new matter, and this new matter the law denies for the plaintiff, and requires the defendant to prove.

It being admitted that the parties hereto intermarried at the time and place stated in the complaint, evidence is necessary to determine the following questions:

1. Was the plaintiff, on April 6th, 1868, the wife of James L. Dee?

2. Was the defendant, at Kirtland, in the State of Ohio, on the 10th day of January, 1834, lawfully married to Mary Ann Angell, and was the said Mary Ann his wife on April 6th, 1868?

3. If these questions shall be determined against the defendant, it will then become an important question whether the defendant has treated the plaintiff unkindly, cruelly, inhumanly, or has deserted or failed to support her; which, in his answer, the defendant denies. If, however, the first two questions, or either of them, shall be determined against the plaintiff; or, in other words, if it shall appear that the parties knowingly entered into a polygamous or bigamous marriage, this Court will not grant the divorce prayed for. But the Court is not permitted to presume what the evidence will be. The witnesses necessary to maintain or to defeat this action are liable to be widely scattered in Utah, in Ohio, or elsewhere; and the litigation is liable to be protracted and expensive. Can the Court lawfully require the defendant to pay an allowance for *ad interim* alimony and for the expenses of prosecuting the action?

The Utah statute is silent upon this question, but that silence does not answer it in the negative. "The allowance for *ad interim* alimony does not depend wholly upon the statute, but upon the practice of the court as it existed before the statute." (*North v. North*, 1 *Barb. Ch. R.* 241.) In *Cast v. Cast, ad interim* alimony was allowed by the unanimous decision of the Supreme Court of Utah.

"This question seems plain on principle. First, the authority to make the order belongs to the Court under the law imported by our forefathers to this country; secondly, if this were not so, still it springs up necessarily out of the legal relation of the parties, and the condition of facts appearing of record before the Court to which the application is made. And if any one principle of our jurisprudence is more worthy of commendation than another, it is, that the tribunals may always be pressed to action whenever the case comes within established legal rule, though not within any precedent." (2 *Bishop on Marriage and Divorce, sec.* 396.) Chancellor Kent says: "I am entirely convinced from my own judicial experience, that such a discretion is properly confided to the Courts." (2 *Kent Com.* 99, *note.*) "The power to decree alimony falls within the general powers of a court of equity, and exists independently of statutory authority." (*Galland v. Galland*, 38 *Cal.*, 265.)

Is the case at bar, as it now stands in Court, a proper case for the exercise of this authority?

Bishop supposes the case of a woman marrying a man and afterwards finding that he "has already another wife living, and so the marriage is void. She may indeed treat it as void without a judicial sentence; yet suppose, that, instead of this, she brings her suit against the man to have it decreed null. Her property is practically in his hands, though in point of law she retain the title. But since she has elected to let the Court settle the question of nullity in a direct proceeding for this purpose, she has the same claim upon the Court to have appropriated to her so much of this property as her necessities demand while the suit is going on, as though she alleged the marriage to be valid, and sought its dissolution for a cause occurring subsequently to the nuptials. In like manner, where the man seeks to establish the nullity of his marriage on the allegation that the woman has a former husband living, she may have alimony pending the suit, and money to defend." (2 *Bishop on Mar. and Div. sec.* 402.) "And this is so, even though it is alleged that the marriage was brought about by the fraudulent practices of the supposed wife, and though the costs of the suit may ultimately be awarded against her." (*Id. note* 2.)

In a case in New York, in which the supposed wife alleged marriage and cohabitation, the supposed husband denied the marriage but did not deny the cohabitation; and thereupon Vice-Chancellor McCoun made the allowance of temporary alimony, and money to carry on the suit. (*Id. sec.* 404.) In the case at bar the defendant both admits the marriage and fails to deny the cohabitation.

"Where upon an application for temporary alimony and an allowance for expenses, the facts undisputed are such as that from them a presumption arises that the parties were married, so that the affirmitive rests upon the defendent to repel that presumption, the Court has jurisdiction and power to grant the application, although marriage, in fact, is denied." (*Brinkley v. Brinkley*, 50 *N. Y.*, 184.)

"The *ad interim* alimony and money to sustain the expenses are given, not as of strict right in the wife, but of sound discretion in the Court. Yet the discretion is a judicial, not an arbitrary one. And when a case is brought within the principles recognized as entitling the wife to the allowance, the allowance follows pretty much as of course, without inquiry into the merits of the case. If, for example, she is plaintiff, it is no objection that the husband denies her charges under oath." (2 *Bishop on Marriage and Divorce, sec.* 406.)

Owing to the peculiar notoriety of the parties, and to the importance of this case in the jurisprudence of Utah, it has been deemed desirable to show, even at the risk of being elementary, that this case comes clearly within the principles universally recognized as giving a woman who is a party to a suit for divorce, a just claim for alimony and sustenance; "the one being for the defraying of the ordinary expenses of the wife in the matter of living; the other being for the same purpose in respect to the matter of the suit." (*Id. sec.* 387.)

It now becomes important to inquire what principles must guide the Court in fixing the amount of the allowance in this case.

"As a general proposition, the fund out of which the wife is entitled to her alimony is the *income* of the husband, from whatever source derived or derivable." (*Id. sec.* 447.)

"The ordinary rule of temporary alimony is to allow the wife about one-fifth of the joint income. * * * This is regarded as a fair medium, though the proportion will vary * * * according to circumstances. When the necessities and claims of the wife have been large, one-fourth has been allotted; and Sir John Nickoll, in one case * * granted the wife £50 per year out of an income of £140 * * On the other hand, in different and peculiar circumstances, the wife has been obliged to accept as small a proportion as one-eighth." (*Id. sec.* 460.) "Alimony *pendente lite* is usually made, by the terms of the order itself, to commence from the return of the citation. This is the true rule. * * * But it may be made to commence earlier or later." (*Id. sec.* 424; *Burr v. Burr*, 7 *Hill* 207.

The plaintiff alleges in her complaint "that the defendant was, at the time of her said marriage, ever since then has been, and is yet, the owner in his own right, of vast wealth, amounting to several millions of dollars, and is in the monthly receipt of an income therefrom of not less than forty thousand dollars;" and she prays for an *ad interim* allowance of one thousand dollars per month.

On the other hand, the defendant "denies that he is or has been the owner of wealth amounting to several millions of dollars, or that he is or has been in the monthly receipt from his property of forty thousand dollars or more. On the contrary the defendant alleges, that according to his best knowledge, information and belief, all his property taken together, does not exceed in value the sum of six hundred thousand dollars, and that his gross income from all of his property, and every source, does not exceed six thousand dollars per month."

"And the defendant denies that one thousand dollars, or any other sum exceeding one hundred dollars per month, would be a reasonable allowance to the plaintiff, even if defendant was under any legal obligation to provide for the maintenance, education and proper medical attendance of said plaintiff and her children during this litigation."

Under all the circumstances of this case, it seems just that the defendant should pay to the plaintiff, to defray the expenses of prosecuting this action, the sum of three thousand dollars; and that he should pay to her, for her maintenance, and for the maintenance and education of her children, the further sum of five hundred dollars per month, to commence from the day of the filing of the complaint herein.

It is ordered accordingly.

Bets are made in London that the Prince of Wales will be assassinated before his return from India. Pleasant speculation!